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No. 03-89

IN THE

Supreme Court of the United States

KIM SHEFFIELD, *et al.*,
Petitioners,

v.

LARRY ACEVES, in His Capacity as Superintendent, Franklin McKinley Elementary School District, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPERINTENDENT RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 15, 2003

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STATEMENT

We do not take issue with the facts stated in Petitioners' Statement of the Case (Pet. at 2-6), although we disagree with the characterizations and legal conclusions intertwined therein.

REASONS FOR DENYING THE WRIT

The first question presented in the Petition is, in the words of baseball immortal Yogi Berra, "like *deja vu* all over again." The Petition marks the fourth time in the last year and a half that attorneys from the National Right to Work Foundation, Inc., have requested this Court to grant a writ of *certiorari* on the issue raised by that question. Each of the past three times, the Court has declined to do so. *See Foster v. Garcy*, 535 U.S. 1112 (2002); *Prescott v. County of El Dorado*, __ U.S. __, 123 S. Ct. 1251 (2003); *Cummings v. Connell*, __ U.S. __, 123 S. Ct. 2577 (2003). The pending Petition raises no new argument as to the first question that has not already been considered and rejected by the Court. There is simply nothing new this time, and the Court should deny *certiorari* on the issue raised by the first question for the same reasons that it has done so in the prior three cases.

The second question presented in the Petition raises no important issue which requires the attention of this Court, and for that reason *certiorari* should be denied as to that question as well. To avoid unnecessary duplication, the Superintendent Respondents join in, adopt and incorporate herein by reference the arguments presented as to that question by the Union Respondents in their Opposition to the Petition. The Superintendent Respondents merely add that if the Court nonetheless grants *certiorari* as to the second question presented, it should *not* grant *certiorari* as to the first question.

I. THIS COURT SHOULD DENY THE PETITION FOR THE SAME REASONS THAT IT RECENTLY DID SO IN THE *FOSTER, PRESCOTT* AND *CUMMINGS* CASES, WITH REGARD TO THE ISSUE OF PUBLIC EMPLOYER LIABILITY

In its first question presented, the Petition seeks *certiorari* as to issue of the liability of public officials for collecting fair

share fees where the union's *Hudson* notice is legally deficient. Pet. at i. Three times in the past year and a half, staff attorneys at the National Right to Work Foundation, Inc., including the same attorney who represents Petitioners in the pending case, Mark J. Beutler, have attempted to convince the Court to grant *certiorari* as to that issue (sometimes expressly and sometimes implicitly as part of a question regarding the legality of fair share fee indemnification agreements and fee payers' standing to challenge such agreements). Three times this Court has declined to do so, most recently just three months ago. *See Foster v. Garcy*, 535 U.S. 1112 (2002); *Prescott v. County of El Dorado*, __ U.S. __, 123 S. Ct. 1251 (2003); *Cummings v. Connell*, __ U.S. __, 123 S. Ct. 2577 (2003).[1] In the present case, as in *Prescott* and *Cummings*, the court of appeals applied the rule regarding public employer liability stated in its earlier decision in *Foster v. Mahdesian*, 268 F.3d 689 (9th Cir. 2001), as to which this Court denied *certiorari* in *Foster v. Garcy*, 535 U.S. 1112. *See* Pet. App. A at 7a, 11a-12; *Cummings v. Connell*, 316 F.3d 886, 896-97 (9th Cir. 2003); *Prescott v. County of El Dorado*, 298 F.3d 844, 846 (9th Cir. 2002).

Nothing has changed since this Court denied the petitions raising this same issue in *Foster*, *Prescott* and *Cummings* just eighteen, seven and two months ago, respectively. Virtually all of the arguments presented in the current Petition as to the issue of public employer liability were presented in the *Foster* petition, often in *haec verba*, and many of them have been repeated in the *Prescott* and *Cummings* petitions. The only argument on that issue that was not presented in the *Foster* petition was that based upon the Tenth Circuit's decision in *Wessel v. City of Albuquerque*, 299 F.2d 1186 (10th Cir.

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[1] *Foster* was Case No. 01-1307, and *certiorari* was denied on June 3, 2002. *Prescott* was Case No. 02-686, and *certiorari* was denied on February 24, 2003. *Cummings* was Case No. 02-1493, and *certiorari* was denied on June 16, 2003.

2002). *See* Pet. at 12. *Wessel* was briefed, however, in both the *Prescott* and the *Cummings* petitions, which were denied by the Court. The Court has therefore already considered and denied *certiorari* on all of the arguments presented in the Petition. Rather than burden the Court with identical briefing of the reasons *certiorari* is not warranted, the Superintendent Respondents refer the Court to the Oppositions in the three previous cases and respectfully request it to deny the Petition in the present case as to the first question for the same reasons that it denied the similar petitions in *Foster*, *Prescott* and *Cummings*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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